

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel. W.A. DREW)
EDMONDSON, in his capacity as ATTORNEY)
GENERAL OF THE STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT C. MILES TROBERT, in his)
capacity as the TRUSTEE FOR NATURAL)
RESOURCES FOR THE STATE OF)
OKLAHOMA,)

Plaintiff(s),)

vs.)

TYSON FOODS, INC., INC., TYSON POULTRY,)
INC., TYSON CHICKEN, INC., COBB-)
VANTRESS, INC., AVIAGEN, INC., CAL-MAINE)
FOODS, INC., CAL-MAINE FARMS, INC.,)
CARGILL, INC., CARGILL TURKEY)
PRODUCTION, LLC, GEORGE'S, INC.,)
GEORGE'S FARMS, INC., PETERSON FARMS,)
INC., SIMMONS FOODS, INC., and WILLOW)
BROOK FOODS, INC.,)

Defendant(s).)

Case No. 05-CV-329-TCK-SAJ

SUPPLEMENTAL ORDER

On this 7th day of June 2006, the Court heard argument on Plaintiff's Motion for Clarification of portions of the Court's May 31, 2006 Order. The motion also requested a telephone conference. The motion for a telephone conference is granted. The motion for clarification is granted. [Docket No. 784].

The parties presented three issues to the Court. First, clarification of "one time" entry. Second, clarification of the notice required prior to edge of field run-off sampling. Third, the parties discussed field split samples as compared to laboratory split samples.

Permitted Entries to Property

The May 31, 2006 Order provided that Plaintiff may enter each premise one time for soil, poultry litter, and groundwater sampling. Due to expenses related to geoprobes, possibility of sampling requiring more than a 24 hour time frame, and the desirability of obtaining the poultry litter samples when the poultry is not in residence, the Plaintiff has requested additional clarification of the Court's May 31, 2006 Order.

At the June 7, 2006 hearing, Plaintiff asserted that Plaintiff has not yet determined the properties upon which use of the geoprobe will be necessary. Plaintiff must schedule the geoprobe, and Plaintiff may be unable to determine whether or not the geoprobe will be necessary until after Plaintiff first enters a property.

The Poultry Growers (those non-parties to this action who own property and have been subpoenaed by Plaintiff) noted that because the Poultry Growers prefer the taking of poultry litter samples from the poultry houses when the houses are not housing poultry, that the Poultry Growers are willing to permit an additional access for such an entry.

The Court concludes that the May 31, 2006 order did not address these points and that further clarification is needed. With regard to soil samples, Plaintiff is permitted to enter and leave the property, as necessary, beginning with the first date of entry and proceeding on subsequent contiguous^{1/} days until the necessary soil samples are obtained. Plaintiff may work during daylight hours or, if Plaintiff desires, Plaintiff may work past daylight hours.

^{1/} Plaintiff may, at Plaintiff's option, enter only on contiguous "business" days.

Plaintiff is permitted a "second entry" for groundwater testing if Plaintiff determines that groundwater testing by geoprobe is necessary. Plaintiff should complete any non-geoprobe groundwater testing during the time that Plaintiff is obtaining soil samples from the property to minimize the intrusions to the Poultry Growers.

Plaintiff is permitted an additional entry to the property to obtain poultry litter samples, if such entry will facilitate obtaining such samples when the poultry house is not housing chickens. If Plaintiff cannot coordinate a time to obtain samples when the house is empty, Plaintiff should enter for poultry litter sampling during the time that Plaintiff is obtaining soil samples. Plaintiff should minimize unnecessary intrusions onto the Poultry Growers' properties.

Notice Provisions

The May 31, 2006 Order requires the Poultry Growers and Defendants who want notice to provide to Plaintiff a phone number or email address for the receipt of such notice. The parties have agreed that with respect to edge of field rainwater runoff sampling, such notice shall be by phone. The May 31, 2006 Order provided that as long as Plaintiff gave notice, Plaintiff could proceed with sampling even if the Poultry Growers, Defendants, or Defendants' representatives did not appear to participate in sampling. The required notice for edge of field rainwater runoff sampling is three hours.

The dispute between the parties concerns the notice required. Plaintiff maintains that notice is sufficient if Plaintiff calls the provided telephone number(s). The Poultry Growers believe that actual notice is required. The Court concludes that the burden is on the Poultry Growers to provide contact information that is sufficiently valid in order to permit Plaintiff to simply proceed with sampling after calling the provided numbers. The first

contact phone number shall be to the Poultry Grower(s), who will provide both a home phone number and a cell phone number if available. The second contact phone number shall be to the Poultry Grower's attorney. After telephone calls are made to the provided contact numbers, sampling may proceed with no further notice given, even if actual contact is not made. Plaintiff also is not required to wait longer than the designated time frame for representatives prior to proceeding with sampling.

Field Split Samples

With regard to split sampling, the May 31, 2006 Order provides that the State will split the soil samples in the laboratory and provide a sample to a requesting party. The Poultry Growers represent that the current "standard" in the field is to split the samples in the field. Plaintiff maintains that their experts' position is that the laboratory split will provide for a better sample. The Court will not force Plaintiff to follow a position that could taint Plaintiff's expert's analysis. Plaintiff is permitted to split the samples in the laboratory. Plaintiff noted that Plaintiff had no objection to Defendant or the Poultry Growers having an agent accompany Plaintiff when Plaintiff mailed the samples to the laboratory, and had no objection to an agent of Defendant or Poultry Growers being present when the samples are received by the laboratory, or observing the split in the laboratory. If Defendant or the Poultry Growers desire such an arrangement, Defendant or the Poultry Growers should contact Plaintiff.

The motion for telephone conference and for clarification is granted.

Dated this 9th day of June 2006.


Sam A. Joyner
United States Magistrate Judge